Waterway and Wetland Handbook
CHAPTER 180
CRANBERRIES

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PURPOSE

Cranberry culture cannot exist without a constant supply of water. Therefore, the cranberry laws came into existence over 100 years ago to ensure that supply by granting the right to build dams and other works. These cranberry culture rights have caused a conflict with the public rights in these waters.

MECHANISM

The Cranberry Growers Association (the official representative for cranberry growers per Sections 94.35, Wis. Stats.) and the Department reached a Cooperative Agreement on February 19, 1982 (copy attached). The agreement outlines the procedure to handle all complaints. This agreement must be followed in all regulatory proceedings by the Department.

HISTORY

The Indians were the first to harvest the wild fruit in the marshes which formed eons ago after the retreat of the great glaciers ended the Ice Age. The old glacial lake bed covered parts of southern Wood County, and scattered parts of eastern Jackson, northwestern Monroe and northwestern Juneau Counties. One area has come to be known as the Cranmoor District (Wood County) and the other, Mather-Warrens District (Jackson to Monroe Counties). Later the cranberry industry developed into Washburn and Burnett Counties and, more recently, into Price, Vilas and Oneida Counties.

When French voyagers ventured into Wisconsin from Canada in their search for furs to trade with the early fur companies, they saw the Indians harvesting wild cranberries. Leseur, in "Fort on the Mississippi" (1700), says that the Indians made an encampment in the place where they went annually to gather cranberries or "Atoqua" as the Algonquin Indians called them.

In 1828, a New Englander, who became a pioneer storekeeper in Green Bay and later in La Crosse, took eight boatloads of cranberries from Green Bay, Wisconsin, to Galena, Illinois. The fruit was exchanged for provisions to supply a camp of Indian shinglemakers who were working for a merchant at the mouth of the Yellow River in Juneau County. In 1829, another early settler mentions the purchase of three canoe loads of cranberries brought down the Yellow River by Indians from Cranmoor marshes.

A considerable trade in wild cranberries was carried on in Juneau County with the Winnebago Indians in 1849. The Wisconsin berry crop became so important that a law was passed providing a penalty of $50.00 for picking or having unripe cranberries in one's possession before the harvest date of September 20.

The cultivation of the wild fruit seems to have begun in the Berlin area in 1858. A year later the crop was too large to harvest completely. Commercial growing of the wild berry was well established, and by 1865, there were one thousand acres of improved marsh in the Berlin Area. Indians brought in the harvest, much of which was shipped to the Chicago market.

The preamble to Chapter 40, Laws of 1867 reads as follows: "An Act to encourage the cultivation of cranberries." The Act expressly conferred upon cranberry growers the right "to build and erect, keep up and maintain such dam or dams upon and across any stream, ditch, sluice, slough or any body of water, as shall be necessary for the purpose of flooding said marshlands."

In 1870, when Whittlesey and Balch, two young cranberry pioneers, went exploring for good cranberry raising country, they described the region in Juneau, Jackson and Wood Counties as "a vast uninhabited wilderness of level, wet marsh consisting of spongy peat, two to twenty feet deep, interspersed with islands of two to two hundred acres of higher sandy land, covered with pine, tamarack and tangled brush, shading off to spaces of open marsh where patches of wild cranberry vines could be seen with their crop of ungathered red berries awaiting the coming of adventurous, fortuitous pioneers such as we."

During the decade 1870 to 1880, cranberry bogs were literally hacked by hand out of the wilderness. Roots were dug out by manual labor. A special plow was devised to "scalp" or remove sod from areas to be sanded and planted to vines. Ditches were dug around sections of the bog to drain off surface water into a main drainage system.

After 1893, three cranberry experiment stations were established to advise growers. Later the stations were consolidated into one in Cranmoor Township, and this was operated from 1903 to 1917. Now the Wisconsin Agricultural Extension division maintains a branch station near Cranmoor.

Vines were first imported into Wisconsin in 1871 and came from New Jersey. But the most important variety grown in the state was developed in 1893 from a native berry by a Wisconsin farmer, Andrew Searles. The berry was named Searles Jumbo in his honor and in recognition of its size.

Chapter 61, Laws of 1878, was the first amendment to the cranberry laws which spelled out that only owners of "cranberry lands" are permitted to divert water under such grant of authority.

Chapter 32, Laws of 1883, was a further amendment which added language describing the purposes for which diverted water may be used: "for the purpose of bringing and flooding, or draining and carrying off the water

from such cranberry growing lands, or for the purpose of irrigation, fertilization and drainage of any other lands owned by such person...." This is now chapter 94, Wis. Stats.

Later amendments did not significantly change the rights conferred under the Act of 1867.

In Wisconsin common law gives the riparian the right to use the water of the waterway in a reasonable way for such purposes as irrigating his land. However, there is a marked distinction between the diversion of water to irrigate crops and the diversion of water to grow cranberries. The purpose of irrigating crops is to promote growth while the diversion of water for growing cranberries is to flood the fields to protect the berries from frost, to kill insects or weeds and to prevent winter-kill and also harvesting. It is unclear whether this use of water falls within the common law rule permitting the use of water for irrigation. It is unknown whether the legislature in passing the original cranberry law was trying to favor the cranberry growers or if they were attempting to amend the common law rule of irrigation by giving cranberry growers greater rights than other riparians.

The constitutionality of the Cranberry Laws has been questioned, but the Supreme Court has avoided ruling on that question.

The fact that only two major cases went to the Supreme Court was most likely due to the small number of new marshes that were constructed since 1900.

The first cranberry law decision by the Wisconsin Railroad Commission was made on November 30, 1918, on the application of the McKinzie Lake Cranberry Company for permission to divert water from McKinzie Creek (22 WRCR 216). The commission found that the project as proposed would not adversely affect riparian owners on the McKinzie Lakes. However, jurisdiction was retained to protect the riparian owners in the event that the diversion would later adversely affect riparian owners.

The next decision was in 1935 when the Public Service Commission assumed jurisdiction over an application made by a cranberry grower for a permit to construct a dam on a navigable stream (9 WPSC 583).

There have been a total of 12 proceedings covering all water diversion matters in which cranberry growers appeared before the PSC and DNR. Most of these proceedings were brought under ss. 30.195, 31.06, and 31.14 (now 30.18), Wis. Stats. Otherwise, the growers operated under Section 94.26, Wis. Stats.

Supreme Court Cases

Cranberry Creek Drainage District v. Elm Lake Cranberry Company, 170 Wis. 362 (1920) Cranberry growers have the right to divert a natural watercourse. "It is clear that whatever rights were granted to the owners of the land adapted to cranberry culture they were not paramount to rights involving the public health and welfare, but subordinate thereto."

State v. Zawistowski, 95 Wis. 2d 250 (1980) - Section 94.26, Wis. Stats., exempts cranberry growers from getting a section 30.18, Wis. Stats., permit. Use of water is limited by the common law reasonable use doctrine.

The court also stated, "The position of the agencies charged with enforcement of the permit law has been most ambiguous. In fact, from the record it seems clear that most of these actions have indicated that the growers were governed by the cranberry law."

Attorney General Opinions

In 45 OAG 36 dated January 23, 1956, the Attorney General stated that cranberry growers constructing dams on navigable steams under the authority of Section 94.26, Wis. Stats., must secure a permit under Chapter 31.

In 54 OAG 24 dated April 12, 1965, the Attorney General stated that an owner of cranberry lands may not divert water from a navigable lake or stream under s. 94.26, Wis. Stats., without a permit under s. 30.18, Wis. Stats. This opinion has been overturned by the Zawistowski decision.

Department Interpretations

The Public Service Commission (PSC) and the Department have not taken an active stand on asserting jurisdiction over cranberry operations. It was the opinion of PSC staff that they did not have the jurisdiction, and it was not until the early 1970s that Department staff started to investigate complaints and assert jurisdiction.

Following the Zawistowski decision, the Department requested another opinion from the Attorney General on regulatory enforcement authority. Attorney General Bronson LaFollette sent a letter to Department Secretary Anthony S. Earl on August 4, 1980, with his informal opinion. He indicated that the Zawistowski decision should not be interpreted to hold cranberry growers exempt from all water regulatory statutes enacted to protect public rights. Public rights in waters must always be presumed to override private interest.

STANDARDS

Section 94.26, Wis. Stats., indicted that no dam or ditches shall injure any other dams or ditches constructed or maintained for a like purpose by any other person. Section 94.27, Wis. Stats., requires the person building such a dam shall be liable to the persons whose lands are overflowed or otherwise injured.

The Corps of Engineers has taken jurisdiction on some marsh expansion and also new marshes under Section 10 and Section 404.

PROCESS

Application

At the present time, according to the cooperative agreement, the cranberry growers will not apply for any authority under Chapters 30 and 31, Wis. Stats.

Administrative Rules

NR 115 - Flooding, dike and dam construction, and ditching shall be allowed for the purpose of growing and harvesting cranberries.

Notice Requirements

Since no permits are applied for, no notice is required.

Field Investigation

When the Department has or receives a complaint the first step by the agreement is for the investigator to contact the grower to determine what the conditions are and/or what is proposed.

Once the proposal is understood, the investigator should determine the field investigation considerations recommended by referring to the handbook chapters relating to each type of activity (i.e., diversion, new dam, dredging, ditching, etc.)

Final Disposition

The procedure to follow is outlined in the agreement between the Department and the growers and is intended to provide a reasonably expeditious mechanism to resolve conflicts.

The Department entered into this agreement as a reasonable way to deal with this important element of Wisconsin agriculture. Robert W. Roden has been appointed to serve as the Department liaison with the growers. It is expected that the great majority of situations can be handled at the district level without resorting to the more formal liaison process.

ENFORCEMENT

If a situation cannot be resolved by the agreement, the Department may seek judicial relief through Circuit Court or s. 30.03, Wis. Stats.

The Bureau of Legal Services has indicated that the next enforcement case they process has got to be clearly causing environmental damage or interfering with public rights.

EDUCATION

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Cranberry Growing in Wisconsin, Circular 654, July 1966, Extension Service, College of Agriculture, University of Wisconsin.

The Cranberry Plant, Dr. Malcolm N. Dana, the Department of Horticulture, University of Wisconsin-Madison, March 12, 1974.

Cranberry Varieties of North America, Bulletin 513, Experiment Station, College of Agriculture, University of Massachusetts.

Cranberry Weed Control in Wisconsin, by Dr. Malcolm Dana, University of Wisconsin-Madison Extension, A 2226.

A History of the Cranberry Industry in Wisconsin, Dr. George L. Peltier, 1970, Hario Press.

An Introduction to Wetlands, Feb. 1979, Wis. Geological & Natural History Survey.

Measurement of Water Movement in Soil Pendons Above the Water Table, Wis. Geological & Natural History Survey, Information Circular - 27.

Mineral & Water Resources of Wisconsin, Nov. 1976 Report, by U.S. Geological Survey to U.S. Senate, 78-847.

Modern Cultural Practice in Cranberry Growing, Sept., 1969, Publication 39, Agriculture Experiment Station, University of Massachusetts, Cooperative Extension Service.

Prescriptive Water Rights in Wisconsin, 1961 Wis. Law Review, 46 ff. at p. 55 and 56.

Research Into Action, Publication 45, Cooperative Extension, College of Agriculture, University of Massachusetts.

Resource Survey of the Wisconsin Cranberry Industry, by G.C. Klingbiet, Emeritus Professor of Horticulture, University of Wisconsin-Madison, 1982.

A Review of Cranberry Weed Control, by Dr. Malcom Dana, Wisconsin Cranberry School, March 13, 1975.

Sprinkler Frost Protection, by John S. Norton, Wisconsin Cranberry Growers Association, 1967.

Sprinkler Systems For Cranberry Bogs, Bulletin 532, Experiment Station, College of Agriculture, University of Massachusetts.

A Study of Laws Pertaining to the Culture of Cranberries, by Adolf Kanneberg, Wisconsin Public Service Commission.

Water for Cranberry Culture in the Cranmoor Area of Central Wisconsin, Geological Survey Water Supply Paper 1999-1, U.S. Geological Survey.

Wetlands & Cranberry Growing -- the Perfect Marriage, Information folder published in 1980 by Wisconsin Cranberry Growers Association.

Wisconsin Cranberry Lore, by G.C. Klingbiel, University of Wisconsin-Madison Extension, A 2292.

COOPERATIVE AGREEMENT

The State of Wisconsin Department of Natural Resources (DNR) and the Wisconsin Cranberry Growers Association (Growers) find that it is desirable to formalize a cooperative procedure for considering matters of mutual concern, because of an inability to agree on the extent of state regulation of cranberry operations as a result of State v. Zawistowski, 95 Wis.2d 250.

1. To facilitate DNR understanding of cranberry culture, the Growers will appoint one or more persons to assist DNR personnel in understanding the water uses of each class of cranberry growers in the state.

2. DNR and the Growers will designate individuals to serve as liaisons on matters of concern.

3. In the event that concerns arise because of the operation of a specific marsh, the following procedure will be utilized.

A. When DNR receives a complaint about a cranberry operation, it will contact the grower as soon as possible. The purpose of this contact is to determine what the conditions are and if the matter can be resolved informally. This applies to existing or proposed marshes.

B. If the matter is not resolved within 5 working days of the contact with the grower, the DNR shall refer it to the Growers' liaison.

C. The Growers' liaison will review the information provided by DNR. After this review, the grower and complainant will be contacted to determine if there is a basis for resolution. The Growers' liaison shall inform the DNR liaison of the status of the matter within 10 working days after the referral. If the Growers' liaison believes that the matter can be resolved, they will indicate the date of anticipated resolution.

D. It is understood that at anytime DNR finds that a cranberry operation is causing environmental damage or interfering with public rights and an agreement cannot be reached, it may seek judicial relief.

E. The Growers' liaison will provide the DNR liaison with a final report of their investigation and resolution within 45 days after referral by the DNR liaison to the Growers' liaison.

F. If the matter cannot be resolved under this procedure, DNR may seek judicial remedy.

G. If the matter is resolved or DNR does not act under F., DNR shall make a written record of the disposition of the issues raised under A.

H. The Growers shall establish a procedure to insure that new owners are informed ofany agreements reached with DNR concerning the operation of their cranberry marsh.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES
Date: January 27, 1982 By Carroll D. Besadny, Secretary

WISCONSIN CRANBERRY GROWERS' ASSOCIATION
Date: February 18, 1982 By Charles H. Lewis, President

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

Date: March 15, 1989 File Ref: 3500

To: Water Regulation Program Staff

Put In: Chapter 180, Water Regulation Handbook

From: Scott Hausmann - WZ

Distribution: Program Staff

Subject: Supreme Court Decision, Tenpas v. WDNR

Attached is the March 1, 1989, Wisconsin Supreme Court decision on the applicability of the financial responsibility requirements of s. 710.11, Stats., and related portions of Ch. 31 to cranberry dams.

The Bureau will be providing guidance after consultation with the Attorney General's Office.

SH:el
Attach.

No. 86-1430
STATE OF WISCONSIN : IN SUPREME COURT

Filed: Mar 10 1989, Marilyn Graves, Clerk of Supreme Court, Madison WI

Jeffrey B. Tenpas and Barbara J. Tenpas,
Plaintiffs-Respondents-Petitioners

v.

Wisconsin Department of Natural Resources,
Defendant-Appellant-Respondent.

REVIEW of a decision of the Court of Appeals. Reversed.

HEFFERNAN, CHIEF JUSTICE. This is an appeal from a decision of the court of appeals which reversed the circuit court for Adams county, Raymond Gieringer, Judge. We reverse the decision of the court of appeals. This case presents the question of whether cranberry dams in this state are subject to the financial responsibility requirements of sec. 710-11, Stats., and related portions of chapter 31 of the state statutes.

Plaintiffs Jeffrey and Barbara Tenpas are cranberry growers who in July of 1983 bought a cranberry marsh in Adams county. Their land is crossed by Bingham Creek, a navigable stream, and includes two dams across the creek. The dams were built in 1938 for the purpose of cranberry cultivation and have since been used continuously as cranberry dams.

On June 14, 1984, the Wisconsin Department of Natural Resources (DNR) wrote the Tenpases (hereinafter Tenpas) stating that the land they had bought was not properly transferred because Tenpas had no permit for the transfer of the dams as required under sec. 710.11, Stats.[1] The DNR letter suggested that noncompliance with the dam transfer statute clouded the Tenpas title to the land and would make mortgaging difficult.

Under protest, Tenpas applied for and obtained a DNR dam transfer permit. The issued permit identifies the two dams involved as earthen dikes that have concrete water control structures approximately eight feet wide and eight feet tall.

The dam transfer permit issued by the DNR contained several significant conditions which Tenpas was required to accept to receive the permit. First, Tenpas was ordered to complete certain specified repairs to the dams.[2] Tenpas was also ordered to file a $2,500 letter of credit for ten years, the credit amount to be reduced to $1,000 after the specified repairs were completed. Tenpas was ordered to waive any objection to unlimited DNR inspection of the dam. And finally, the DNR permit established a maximum level for the water behind the upper dam. The permit also reserves for the DNR the right to establish by subsequent order a minimum flow of water from the lower dam.

While the permit application was pending, Tenpas began this action asking the circuit court to declare that cranberry growers are not subject to sec. 710.11, Stats. Judge Gieringer decided the matter on summary judgment, finding that DNR regulation of cranberry dams under sec. 710.11, Stats., would impermissibly conflict with rights granted to growers by the cranberry laws, secs. 94.26 to 94-30, Stats., passed in 1867. Tenpas was granted summary judgment declaring his right to be free of the requirements of sec. 710. 11, Stats. The DNR appealed.

The court of appeals reversed the judgment, finding that the dam transfer permit requirement of sec. 710-11, Stats., applies to all dams in the state, including cranberry dams; and that the dam transfer permit requirement does not conflict with the scheme set up by the legislature under the cranberry laws. Judge Sundby, dissenting, stated that chapter 31 dam transfer regulations do not apply to cranberry growers. He concluded that the power of cranberry growers to use water and dams for cranberry cultivation has been independently regulated for 120 years by the cranberry laws, without interference by the DNR or its predecessors. Sundby urged that if a legislative act seeks to impose DNR regulation under chapter 31 on the cranberry industry, it must be more advertent than sec. 710.11, Stats.

This case involves application of statutes to undisputed facts. It therefore presents a question of law, a question to be reviewed by this court de novo, without deference to the decisions of the courts below. City of Waukesha v Salbashian, 128 Wis. 2d 334, 347, 382 N.W.2d 52 (1986).

The parties agree that cranberry dam owners were granted certain rights by the legislature in 1867. Presently codified in sec. 94.26 et. seq., Stats., the essential grant of the cranberry laws provides:[3]

> "Any person owning lands adapted to the culture of cranberries may build and maintain on any land owned by him such dams upon any watercourse or ditch as shall be necessary…"

The cranberry laws also impose liability for, and provide a procedure for recovering, damages that are caused by cranberry dams. Sections 94.27 to 94-30, Stats., provide a comprehensive scheme for the erection and maintenance of cranberry dams and detailed procedures for arbitration and recovery of damages if injury is occasioned by the failure of a dam. They appear to provide strict liability subject to implementation under special procedures.

The DNR urges that the rights granted by the cranberry laws only narrowly limit their general power to regulate dams under chapter 31 of the statutes. The DNR argues that their regulatory power is displaced by the cranberry laws only with regard to whether, where and for what purpose a cranberry cultivator seeks to build a dam. Tenpas argues, on the other hand, that as cranberry growers the specificity of the cranberry laws exempt them from general DNR regulation of dams under chapters 30 and 31.

The DNR has also urged, and the court of appeals majority generally agreed, that this case should focus on sec. 710.11, Stats. The DNR argues that sec. 710-11, Stats., establishes regulation of financial responsibility for all dams. Recently enacted,[4] it contains no express exception or cross-reference to the cranberry laws. Even if it conflicts with rights granted under the cranberry laws, the DNR urges us to hold that sec. 710-11 supersedes earlier, contrary law.

We conclude, however, that sec. 710.11, Stats., is not amenable to strictly independent interpretation. On its face, sec. 710.11 itself does not define a new or separate wrong. Section 710-11, Stats., provides,

> "[a] person may not accept the transfer of the ownership of a specific piece of land on which a dam is physically located unless the person complies with s. 31.14(4)."

The statute merely gives notice of a consequence of failure to comply with sec. 31.14(4), Stats. The legislative note accompanying see. 710-11 states that the purpose of the provision is to: [5]

> "... ensure that people working in the real estate profession, including brokers, attorneys and mortgage insurance companies, will be aware of the requirements of sections 31.14(4) and 31.185(1) and (2)…"

At oral argument, counsel for the DNR agreed that sec. 710.11, Stats., is no more than a provision giving notice of some of the requirements of ch. 31. We therefore consider the relevant portions of chapter 31 of the statutes.

Chapter 31 of the statutes is entitled, "Regulation of Dams and Bridges Affecting Navigable Waters." Together with chapter 30 ("Navigable Water, Harbors and Navigation"), it provides a comprehensive scheme for the regulation of Wisconsin's waters, dams and bridges through the use of permits issued by the DNR. The DNR has broad regulatory power under these chapters. For example, sec. 31.02, Stats., empowers the DNR to regulate the level and flow of all navigable water and to determine methods of construction, operation and maintenance of

any dam. The legislative commitment to comprehensive administrative regulation of Wisconsin's water use law under chapters 30 and 31 is longstanding, beginning with the water power acts of 1911, 1913 and 1915. A. Kanneberg, Wisconsin Law of Waters, 1946 Wis. L. Rev. 345, 360.

The specific portion of chapter 31 under which the DNR claims to act in this case is sec. 31.14(4). Section 31.14 regulates dam maintenance by requiring special permits for dam building, improvement or transfer. Section 31.14(2) provides that all dams built or enlarged will be issued permits only after the "applicant furnishes to the department proof of ability to operate and maintain the dam in good condition." Subsection (4) imposes the same financial responsibility requirement whenever the ownership of a dam is transferred. [6]

To determine whether sec. 31.14(4), Stats., applies to cranberry dams, we look to the language of the statute itself. Ball v District No. 4 Area Board, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984). Operation of sec. 31.14(4) is triggered by the transfer of the ownership of "a dam." And although we construe sec. 31.14 as a comprehensive statute, the term "dam" is not specifically limited or defined in that section, or elsewhere in the chapter. We might presume that the unqualified term "dam" makes this section applicable to every dam in the state, including cranberry dams.

We do not adopt the construction of sec. 31.14(4) advocated by the DNR because, as we explain more fully below, it would conflict with rights granted growers under the cranberry laws. We will construe statutes, where it is reasonable, so as to avoid conflict with other statutes. State ex rel. McManman v Thomas, 150 Wis. 1909 196, 136 N.W. 623 (1912). Consequently, we find the most reasonable construction of sec. 31.14(4) provides the DNR with regulatory power over dams generally, with the exception of cranberry dams.

The provisions of secs. 31.14 seem designed to accommodate the regulation of large power dams. Section 31.14(2) speaks of proving financial responsibility for maintenance by establishing special assessment districts. The statute alto allows nonmunicipal dam owners to prove financial responsibility by posting bond. Section 31.14(5) provides also that the DNR may require creation of a fund for major repairs or removal of the dam when necessary, but does not apply to dam owners who have the power of eminent domain.

The legislative history of sec. 31.14 suggests that it is intended to regulate power dams, rather than cranberry dams. Section 31.14 was drafted by the Water Resources Committee of the Wisconsin Legislative Council and was enacted into law by 1961 Laws of Wisconsin Chapter 568. Both the minutes of the Committee and the 1959 Joint Resolution of the legislature that prompted the Committee are concerned primarily with the problem of abandonment of large dams by power companies. See Wisconsin Legislative Council Staff Report 61-2, available in Wisconsin Legislative Council and Council Committees, 1959-61 (Legislative Reference Bureau). No mention was made of cranberry dams despite preexisting cranberry dam regulation.

We are aided in the construction of this statute by the history of application of this body of law. Administrative interpretation by the DNR is one avenue of inquiry. State ex rel. Strykowski v Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978). Tenpas submits that the DNR has heretofore not required cranberry growers to submit to regulation under chapter 31 of the statutes. If the DNR believed they had power to regulate cranberry growers under chapter 31, they have presented no evidence of a prior administrative construction to that effect.

Nine years ago in State v Zawistowski, 95 Wis. 2d 25.0, 290 N.W.2d 303 (1980), this court considered whether DNR water-use permits under sec. 30-18, Stats., are required of cranberry growers. Section 30-18 requires persons who divert water from streams or lakes to obtain a DNR permit. Despite its sweeping and unambiguous language, the court found this permit requirement to conflict with the right to build and maintain dams and ditches granted by the cranberry laws: cranberry dams and ditches are useless if they may not be filled with water. Relying on the rule that the more specific statute prevails, Zawistowski held that cranberry dams are more specifically regulated by the cranberry laws than by the generalized DNR water use regulations of chapter 30.

Although Zawistowski found conflict on general grounds between the cranberry laws and the DNR water-use permit requirement, the DNR urges that the permit requirement in this case would not conflict with rights granted to growers under the cranberry laws. Assurances of financial responsibility, the DNR argues, do not interfere with cranberry growers right to "build and maintain" dams under the cranberry laws. After styling the permit in this case as a limited and modest requirement, the DNR asks that we affirm their permit power on the grounds that it does not conflict with rights granted by the cranberry laws.

We find a conflict. The power to grant or withhold a permit is the power to regulate. Section 31.14 requires dam owners to supply proof to the DNR that they are financially able to maintain dams as specified the DNR. For non-municipal dam owners, like Tenpas, this reduces to filing a bond in an amount the DNR determines to be sufficient to pay for whatever maintenance it requires. The bond is not imposed as security for damages that might arise from a failure of a dam, but is a means of ensuring that the DNR order of maintenance will be accomplished. However, the power to control cranberry dam maintenance has already been granted to the owners of those dams in sec. 94.26, Stats. The DNR cannot also control the maintenance of those dams without diminishing the previously conferred rights of cranberry dam owners.

Further conflict between see. 31.14(4), Stats., and the cranberry laws becomes apparent from the integrated nature of chapter 31. Section 31.14 is internally integrated and is primarily linked with other parts of chapter 31. Section 31.14(4) operates by requiring compliance with secs. 31.14(2) or (3). These sections, in turn, regulate permits issued under secs. 31.06, 31.08 or 31.13 for the construction, maintenance or enlargement of dams. Section 31.185 is also closely related to sec. 31.14 and requires a permit for alteration or removal of a dam. The integrated nature of dam regulation under chapter 31 suggests the term "dam" used in subsection 31.14(4) be construed in pari materia with its use in other parts of the chapter, thus yielding a consistent whole. State v ILHR Dept., 101 Wis. 2d 396, 403, 304 N.W.2d 758 (1981). The DNR urges that in this case we need not reach the question of the conflict between the cranberry laws and these other provisions of chapter 31. But we see no reason to assume under the basic rationale urged by the DNR that the related sections of chapter 31 will be applied differently. Chapter 31 imposes a panoply of dam regulations which would all apply as logically as sec. 31.14(4) to cranberry dams.

Any doubt that lingers about whether the sec. 31.14(4) dam permit requirement conflicts with rights granted under the cranberry laws can be satisfied by examining the permit issued to the plaintiffs in this case. The permit specifies how Tenpas cranberry dams are to be operated and maintained, expressly ordering a number of repairs to be made as a condition of the permit. The permit also claims power under sec. 31.02, Stats. Counsel for the DNR at oral argument frankly admitted that they do not believe their regulatory power over cranberry growers stops with sec. 31.14(4). This evidence fortifies our conclusion based on the reasoning above that sec. 31.14(4), Stats., conflicts with the cranberry laws.

Consistent with our decision in Zawistowski, we are persuaded that where general DNR dam regulations collide with rights granted by the cranberry laws, the more specific provisions of the cranberry laws apply.

The DNR has also argued that the state's paramount interest in protecting public safety supersedes any rights that cranberry growers were granted under the cranberry laws. They argue on the strength of Cranberry Creek Drainage District v Elm Lake Cranberry Company, 170 Wi.s. 362, 174 N.W. 554 (1920) and Chippewa & Flambeau Imp. Co. v Railroad Comm., 164 Wis. 105, 159 N.W. 739 (1916), that the cranberry laws were long ago superseded by administrative regulation of dams. We find no evidence to support this contention. Certainly this court's decision in Zawistowski stands for a contrary proposition. The fact that the legislature updated the accountability procedure of the cranberry laws under ch. 317, Laws of 1981, confirms the continuing vitality of the cranberry laws as statutes that are to be independently construed.

We do not address the power to impose the strictures of chapters 30 and 31 on cranberry enterprises for it is clear that the legislature hat not made that intent evident. Although public safety is a concern of the state, the DNR presents no authority suggesting that the legislature has delegated to the DNR the power to regulate safety hazards created by cranberry dams. In addition to liability arising under the cranberry laws themselves, cranberry dams are still subject to common law tort and property use restrictions. The public is not unprotected.

We hold that the specific legislative treatment of cranberry growers under sec. 94.26, Stats., precludes application of the general financial responsibility requirements of secs. 710.11 and 31.14(4), Stats., to cranberry dams. Because we conclude that secs. 710.11 and 31.14, Stats., do not apply to cranberry dams, we reverse the decision of the court of appeals and reinstate the declaratory judgment of the trial court.

By the Court: Decision reversed.

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[1] Section 710.11, Stats., provides:

Transfer of land where dam exists.

A person may not accept transfer of the ownership of a specific piece of land on which a dam is physically located unless the person complies with s. 31.14(4).

[2] Finding No. 6 of the permit issued to the Tenpases specifies repair of cracks in the concrete wingwalls and spillways of each dam; replacement of missing concrete in an emergency spillway; and removing woody vegetation from the dikes. Order No. 7 of the permit makes performance of these repairs a condition of acceptance.

[3] Section 94.26, Stats., reads in full:
Cranberry culture; maintenance of dams, etc.
Any person owning lands adapted to the culture of cranberries may build and maintain on any land owned by him such dams upon any watercourse or ditch as shall be necessary for the purpose of flowing such lands, and construct and keep open upon, across and through any lands such drains and ditches as shall be necessary for the purpose of bringing and flooding or draining and carrying off the water from such cranberry growing lands, or for the purpose of irrigation, fertilization and drainage of any other lands owned by such person; provided, that no such dams or ditches shall injure any other dams or ditches theretofore lawfully constructed and maintained for a like purpose by any other person.

[4] Section 710.11, Stats., was introduced to the legislature at the request of the DNR by the Law Revision Committee. It was enacted by Chapter 246 of the Laws of 1981, effective April 27, 1981.

[5] The legislative note to see. 710.11, Stats., reads in full:

"The creation of section 710.11 of the statutes should ensure that people working in the real estate profession, including brokers, attorneys and mortgage insurance companies, will be aware of the requirements of sections 31.14(4) and 31.185(l) and (2) of the statutes. This new awareness should enable the department of natural resources to maintain accurate records regarding dam ownership and improve the administration of its dam safety program."

[6] Section 31-14, Stats. (1985-1986) provides in full:
31.14 Proof of ability to maintain dams required. (1) It is the policy of this section to preserve public rights in navigable waters, including those created by dams, and to provide a means of maintaining dams and the developments which have been made adjacent to the flowage of such dams.

(2)Except as provided in sub. (3), a permit shall not be granted under s. 31.06, 31.08 or 31.13:

(a) Unless the applicant furnishes to the department proof of ability to operate and maintain the dam in good condition, either by the creation of a special assessment district under ss. 31.38 and 66.60, or by any other means which in the department's judgment will give reasonable assurance that the dam will be maintained for a reasonable period of time not less than 10 years; or

(b) If a majority of the municipalities in which 51% or more of the dam or flowage is or will be located files with the department, prior to the granting of the permit, their objections to the granting of such permit in the form of resolutions duly adopted by the governing bodies of such municipalities.

(3) Subsection (2) does not apply if the applicant complies with each of the following requirements:

(a) Furnishes proof satisfactory to the department that he owns or has an enforceable option to purchase all the land which is or will be flowed by the impoundment, together with the shore line and an immediately adjacent strip of land at least 60 feet in width, but the department may in a particular case permit a narrower strip where the 60-foot minimum is impractical and may, in furtherance of the policy stated in sub. (1), require ownership of a wider strip.

(b) Files with the department a writing in such form as the department requires in which he agrees that following the initial filling of the proposed pond he will not convey the dam to another without

first obtaining department approval. The department may require from an applicant who does not have the power of eminent domain a bond or other reasonable assurances that he will adhere to such agreement.

(c) Furnishes proof satisfactory to the department that he has dedicated or will dedicate a parcel of land for public access to the impounded waters.

(4) No person may assume ownership of a dam after October 21, 1961, or the ownership of that specific piece of land on which a dam is physically located after April 27, 1982, without first complying with sub. (2) or (3). The transfer of the ownership of a dam or the ownership of a specific piece of land on which a dam is physically located made without complying with sub. (2) or (3) is void unless a permit to abandon the dam was granted under s. 31.185 or unless the transfer occurred by operation of law. Every person who accepts ownership by operation of law is subject to this chapter.

(5) For the purpose of implementing the policy stated in sub. (1),the department may by rule require all or specified classes of persons operating a dam for profit to create a fund or reserve to be used for major repairs, reconstruction or removal of the dam when necessary. Such rules shall prescribe the manner in which such fund or reserve is to be created, maintained and expended. This subsection shall not apply to a person who has the power of eminent domain.

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: November 6, 1998 FILE REF: Wetlands

TO: Regional Directors

INSERT: Chapter 180, Water Reg. Guidebook

FROM: Scott Hausmann – FH/6

DISTRIBUTION: All Holders

SUBJECT: Practicable Alternatives Analysis Requirements for Cranberry General Permit, GP014-WI, Applications.

The purpose of this guidance is to clarify the scope of the practicable alternatives analysis for proposed activities authorized by the Department of the Army Permit GP-014-WI, "Cranberry Marsh Operations Established Prior to 30 June 1994",

This general permit was negotiated with the Corps of Engineers and the cranberry industry to provide a streamlined permit process for specific cranberry operation activities on cranberry marshes that were established prior to June 30,1994 while providing opportunities to assess the proposed site for potential significant adverse impacts.

The negotiated general permit relates to specific activities associated with established cranberry operations. These activities are (1) expansion of existing cranberry beds, (2) "squaring-off" of existing cranberry beds, (3) construction of new cranberry beds adjacent to existing beds, (4) rehabilitation of abandoned beds (clearing, leveling, etc.) that does not fall under the 404(f) exemption of the Clean Water Act, (5) construction of a dike for subdivision of an existing reservoir that does not fall under the 404(f) exemption of the Clean Water Act, and (6) construction/extension of dikes for reservoir expansion, Use of the general permit is limited to a maximum of 10 acres of disturbance per operation every five years.

While the general permit and state water quality certification requirements still require analysis of the proposed activity following the "avoid and minimize sequence", it was recognized that the permit authorizes only the specific activities described above at existing, established and operating cranberry marshes. Therefore, it was the agency's intent that the alternative (avoidance) analysis for proposed activities authorized by GP-014-WI be limited exclusively to consideration of on-site alternatives.

However, it was also recognized that some cranberry growers operate multiple sites and doing the proposed activity at one site opposed to another could result in less adverse impacts while still meeting the desires and needs of the grower.

Thus the permit requires growers who own or operate more than one cranberry site to describe alternatives to the proposed activity that were considered and explain why they were not chosen, including why the other site(s) were not considered.

Recently questions have been raised whether this requirement includes cranberry sites or operations owned by relatives, minority share holders, stockholders, etc. This requirement was intended and should

be administered to include only those operations or sites under the direct ownership or control of the applicant.

In summary, the alternatives (avoidance) analysis for proposed activities authorized by Corps of Engineers General Permit GP-014-WI should be limited to a consideration of on-site alternatives at the project site or in the case of multiple site ownership or operation, to all available sites.

Approved:
George E. Meyer, Secretary

CORRESPONDENCE/ MEMORANDUM **STATE OF WISCONSIN**

DATE: December 29, 1998 FILE REF: Wetlands

TO: Regional Directors

INSERT: Chapter 180, Water Reg. Guidebook

FROM: Scott Hausmann – FH/6

DISTRIBUTION: All Holders

SUBJECT: Practicable Alternatives Analysis Requirements for Proposed Expansions of Existing Cranberry Operations in Section NR 103.08(4)(c). (For COE Individual permit applications not made under General Permit 014-WI)

Issue:
The purpose of this guidance is to clarify the scope of the practicable alternatives analysis for expansions of existing cranberry operations. This guidance is made pursuant to revisions to NR 103 effective June 1, 1998, and applies to water quality certification decisions for all US Army Corps of Engineers individual permit applications for existing cranberry operations other than those made under General Permit 014. (See November 6, 1998 Staff Guidance applicable to GP 014).

What Is An Existing Cranberry Operation?
An "existing cranberry operation" under NR 103.08(4)(c) means a cranberry operation that was established prior to June 1, 1998. The practicable alternatives analysis made pursuant to a water quality certification decision for a new cranberry marsh is not affected by this staff guidance. Any expansions of cranberry operations which were established after June 1, 1998 will be required to consider the full range of alternatives in their alternatives analysis.

What Are Expansion Activities?
The revision to NR 103 relates to specific "expansion activities" associated with established cranberry operations. These "expansion activities" are (1) expansion of existing cranberry beds, (2) "squaring-off" of existing cranberry beds, (3) construction of new cranberry beds adjacent to existing beds, (4) rehabilitation of abandoned beds, (5) construction of dikes for subdivision of an existing reservoir, and (6) construction or extension of dikes for reservoir expansion.

What Are The Limits On Practicable Alternatives Analysis For Expansions of Existing Operations?
The rule revision and state water quality certification requirements still require analysis of the proposed activity following the "avoid and minimize sequence". Nonetheless, the rule revision limits the extent to which the applicant must search for alternatives.

For water quality certification decisions related to expansion activities, the applicant's search for practicable alternatives is limited to practicable alternatives located within the boundaries of the

existing operation and property adjacent to the location of the proposed expansion. If adjacent property is not available for purchase or if it is available for an unreasonable cost, then it cannot be considered a practicable alternative. Adjacent properties that are not presently owned by the applicant but which could reasonably be obtained, utilized, expanded or managed for the expansion of the existing operation constitute may be considered as practicable alternatives.

Functional Values Analysis

If an applicant has shown that he has avoided and minimized wetland impacts to the greatest extent practicable and the Department determines that there are no alternatives that would avoid wetland impacts, the Department must make a determination on the significance of the project's impacts on the functional values of the affected wetland. Regardless of whether alternatives are available, if a proposed expansion would result in significant adverse impacts to the affected wetland, the standards in NR 103 are not met and water quality certification must be denied. If no practicable alternative is available and the proposal will not result in significant adverse impacts to the affected wetland, then the standards in NR 103 are met and water quality certification should be granted.

Approved: George E. Meyer, Secretary